In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 999

EDWARD BROOKINS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After waiving a jury, petitioner was convicted by the United States District Court for the Middle District of Georgia of various offenses connected with operation of an illegal still (Pet. 5). He was concurrently sentenced to imprisonment for four years on each of four counts and twelve months on a fifth.

A panel of the court of appeals first reversed the conviction on the ground that there was insufficient showing of probable cause for petitioner's warrantless arrest and that evidence and statements (after proper warnings) subsequently obtained from petitioner were therefore inadmissible (Pet. App. 12–26). On rehearing, however, the original panel, Judge

412-473—70

Coleman dissenting, found that there had been probable cause for petitioner's arrest and consequently affirmed the conviction. The sole issue raised by this petition concerns the sufficiency of the evidence to support the finding of probable cause.

The arresting officer, an agent of the Alcohol and Tobacco Tax Unit, testified that on January 30, 1968, he and another agent were looking for a distillery in the southern part of Clay County, Georgia. The agents located an illegal distillery at a distance of approximately 500 yards from the house of petitioner who was known as a major violator in the area.[1] The still was at the time being operated by one Charlie Johnson. The agents stationed themselves between the still and the house, about 25 yards from the still, to wait for the owner of the still to come down to it (Pet. App. 2, 5). They could see portions of the still, could hear it in operation and smell the odor of mash.

About 2:30 p.m., the arresting agent saw petitioner walking straight toward the still from the direction of the house. He was carrying two paper bags. When petitioner was approximately ten yards away from the agent, he stopped. The agent approached him and asked his name, to which petitioner answered, "Ed Brookins". The agent had heard that Brookins owned the farm (Pet. 6). He asked if he could look in the sacks and petitioner gave them to him. Stoppers which were later found to fit jugs at the still were

[1] The agent had heard that petitioner had been arrested, but at that time did not know that he had been convicted (Pet. App. 1-2, 7).

in one of the sacks and a lunch was in the other (Pet. App. 6–7). The agent then placed petitioner under arrest.

Petitioner testified (Pet. App. 9–11) that he had been piling brush with his tractor when he first heard a sound "like an engine running and a blowing fuss." He was then about 250 yards from where he first saw the revenue agent. He walked down a road leading in the direction of the noise and saw the revenue agent, about 150 yards away, approximately 10 feet within the edge of the woods. Petitioner testified that he approached the agent and asked what was going on. The agent asked if there were not a still "over there." Petitioner replied: "I don't know what it is * * * That's my business down here though, I heard that fuss." The agent ascertained his name and placed him under arrest. According to petitioner, the still was 191 yards from the place of arrest.

The facts known to the arresting officer at the time of arrest adequately support the trial court's finding of probable cause. The still was being operated 500 yards from his house and could be heard, according to petitioner's own testimony, 250 yards away. Even on his version of the facts, it is scarcely credible that such an operation could be conducted on his property, that close to his residence, without his knowledge and permission. According to the agent, petitioner was making a beeline for the still when he stopped ten yards away upon sighting the agent, who was in uniform. He was, moreover, known by name as a "major violator." The factual and practical considerations of the situation thus established probable

cause for his arrest for carrying on the business of a distiller without regard to the contents of the bags he was carrying. As this court held in *United States* v. *Gainey*, 380 U.S. 63, the statutory presumption that one present at an operating still is guilty of carrying on the business of a distiller is reasonable because it represents legislative recognition of the natural inference, based upon experience, "that strangers to the illegal business rarely penetrate the curtain of secrecy". 380 U.S. at pp. 67–68. Had appellant been apprehended at the still itself, his presence there would, under *Gainey*, have justified his conviction for carrying on the business of a distiller. When he appeared twenty-five yards from the operation heading directly toward it, the officers had reasonable grounds to believe, as the court of appeals held (Pet. App. 35), that he intended to be present at the still for reasons connected with its operation.[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

DECEMBER 1970.

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[2] The court of appeals' initial decision, as Judge Rives points out in the majority opinion, (Pet. App. 31–34), was based upon the erroneous impression that the basis of the arrest was possession, rather than operation, of an illicit still. Cf. *Klingler* v. *United States*, 409 F. 2d 299 (C.A. 8), certiorari denied, 396 U.S. 859.

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